89-76

No.

Supreme Court, U.S.
FILED
JUL 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

MARSHALL PATNER,

Petitioner,

v.

COUNTY OF LAKE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MARSHALL PATNER
JEREMY HOBBS
DAVID HURWITZ
135 South LaSalle Street (1420)
Chicago, IL 60603
(312) 641-3355

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether a decision of a district court in the same circuit can ever render frivolous a legal argument which was previously found to be not frivolous?

2. Whether the court of appeals in reviewing a district court decision to impose Rule 11 sanctions upon a finding that a claim was legally frivolous should apply an abuse of discretion standard or review the determination de novo?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PRAYER FOR RELIEF

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINIONS BELOW

The opinion of the district court (App. C, *infra*) is reported sub nom. *Coleman v. McLaren*, 631 F. Supp. 763 (N.D.Ill. 1986). The first opinion of the court of appeals (App. D, *infra*) is reported sub nom. *Hamer v. County of Lake*, at 819 F.2d 1362 (7th Cir. 1987).

The decision of the district court (App. E, *infra*) on remand entered January 28, 1988 is unreported. The second opinion of the court of appeals (App. F, *infra*) is reported sub nom. *Hamer v. County of Lake*, at 871 F.2d 58 (7th Cir. 1989).

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on March 23, 1989. On May 31, 1989, Justice Stevens ordered that the time for filing a writ of certiorari in this case be extended to and including July 12, 1989.

STATUTORY AND FEDERAL RULES PROVISIONS INVOLVED

Rule 11, Federal Rules of Civil Procedure and 28 U.S.C. § 1927 are set forth in full at App. A & B, *infra*.

STATEMENT

This case raises the question of whether a court can properly impose sanctions against an attorney under Rule 11, Federal Rules of Civil Procedure, for making legal arguments that the court considers frivolous solely because they had been rejected by another district court in the same circuit.

The petitioner represented the plaintiffs in a class action suit filed in May of 1978 to challenge certain tax assessment practices in Lake and DuPage Counties, Illinois. The suit was brought under 42 U.S.C. §§ 1983 and 1985. While that suit was pending, this Court held that under the Tax Injunction Act, 28 U.S.C. § 1341, federal courts have jurisdiction to consider suits challenging state taxes only if state law fails to provide a "plain, speedy and efficient" remedy. *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981). See also, *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981). As a result, the plaintiffs amended their complaint to focus on the failure of the State of Illinois to provide a plain, speedy and efficient remedy to address

disparities in tax assessments. In October 1983, the district court denied the defendant's motion to dismiss the complaint for failure to state a claim upon which relief can be granted. *Coleman v. McLaren*, 572 F. Supp. 178 (N.D. Ill. 1983). The district court found:

> *Rosewell* involved an attack on Cook County's tax assessment practices. As this court noted in Opinion II, 572 F. Supp. at 181, *Rosewell* held only that the plaintiff there had not proved the absence of "plain, speedy and efficient" Illinois remedies. *Rosewell* thus does not foreclose the inquiry in this case.

Coleman v. McLaren, 631 F. Supp. 749, 754 n.14 (N.D. Ill. 1985).

In October 1985, after the completion of discovery on the jurisdictional issues, the district court found that Illinois provided a plain, speedy and efficient remedy to challenge tax assessment practices and dismissed the complaint for want of subject matter jurisdiction. *Coleman v. McLaren*, 631 F. Supp. at 751.

One of the defendants, Lake County, then petitioned the district court for attorney's fees under 42 U.S.C. § 1988. The defendant claimed that it was entitled to recover the fees it incurred after September 27, 1984, the date on which another district court in a different case, decided that Illinois provided a plain, speedy and efficient remedy to challenge a different aspect of the state's tax practices (*i.e.*, the state's practice not to pay interest on tax refunds). *Hamer v. Anderson*, 594 F. Supp. 561 (N.D.Ill. 1984). The district court granted the defendant's request for sanctions against the class representatives and their attorneys, holding that subsequent to the unappealed district court decision *Hamer v. Anderson* (although not before that decision was rendered), plaintiffs' claims were frivolous and unreasonable under 42 U.S.C. 1988. App., *infra*, at C-6.

On appeal, the Seventh Circuit reviewed the fee award under an abuse of discretion standard, affirmed it as to the

parties, but reversed it as to the attorneys on the ground that § 1988 does not authorize fee awards against attorneys. The court of appeals expressly found that plaintiffs' pleadings were not unreasonable prior to *Hamer v. Anderson*:

> [W]e do not believe that the plaintiffs' specific objections to the Illinois procedures were wholly unreasonable prior to the *Hamer v. Anderson* decision.

App., *infra*, at D-4 n.5. The court also held that two of plaintiffs' four objections to the adequacy of Illinois procedures were not frivolous or unreasonable at all. App., *infra*, at D-14. Nevertheless, the court of appeals found that plaintiffs' other two objections were unreasonable in light of *Hamer v. Anderson*, and affirmed the award of fees against the plaintiffs. App., *infra*, at D-16.

On remand, the district court ordered sanctions against petitioner and co-counsel under Rule 11 and/or 28 U.S.C. § 1927. Petitioner and co-counsel appealed and requested that the court of appeals review de novo the question of whether petitioner's pleadings were legally frivolous. The court of appeals refused to review the underlying conduct, holding that such review was barred by the law of the case, and imposed further sanctions against plaintiffs' counsel for pursuing the appeal. App., *infra*, at F-4, 6.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision means that in the Seventh Circuit an attorney risks Rule 11 sanctions whenever he pursues a legal claim that has been rejected by another district court in that circuit. The court expressly held that the plaintiffs' claim was *not* frivolous before the *Hamer v. Anderson* decision but that it became frivolous as a result of *Hamer v. Anderson*. This decision flies in the face of hornbook notions of the precedential effect to be given to district court decisions and is contrary to all accepted notions of frivolousness. It threatens to seriously chill attorneys who attempt to fulfill their ethical obligation to zealously repre-

sent their clients, particularly in cases under the civil rights statutes.

This Court should grant certiorari in order to clarify the proper scope of Rule 11 in cases involving allegedly frivolous legal claims. It should also grant certiorari to resolve the conflict among the circuits as to whether courts of appeals should review district court decisions imposing Rule 11 sanctions against attorneys who raise allegedly frivolous legal claims *de novo* or for abuse of discretion.

I. The Court of Appeals Has Set A Dangerous Precedent In Holding That An Unappealed Decision Of A District Court Can Render Frivolous An Otherwise Reasonable Legal Claim

The courts below agreed that plaintiffs' objections to the Illinois tax procedures were not frivolous when filed. App., *infra*, at C-5, D-17 n.15. Nor, as the court of appeals expressly found, were they rendered frivolous or unreasonable by the intervening Supreme Court decision in *Rosewell*:

> Given the Court's divided opinion with respect to the adequacy of Illinois procedures and the reservations expressed in Justice Blackmun's deciding vote, we do not believe that the plaintiffs' specific objections to the Illinois procedures were wholly unreasonable prior to the *Hamer v. Anderson* decision.

App., *infra*, at D-4 n.5. The courts held that the claims became frivolous only after another district court rejected similar claims in *Hamer v. Anderson*. App., *infra*, at D-17 n.15.

The court of appeals, by holding that a decision of a district court in the same circuit can render frivolous a legal argument which was previously found not to be frivolous, has grossly distorted the rule of precedent in a way that will chill zealous legal advocacy. The district courts in the Seventh Circuit have already began to apply the court of appeals approach. In *TMF Tool Co. v. H.M. Financier & Holding S.A.*, No. 87-8620 (N.D. Ill., August 17, 1988)

App. G, *infra*, decided after the first court of appeals' opinion in this case, the district court held that the unappealed opinion of another district judge in ***E/M Lubricants, Inc. v. Microfral, S.A.R.L.***, 91 F.R.D. 235 (N.D. Ill. 1981) had become the "law of the circuit", and therefore imposed sanctions against plaintiff's counsel for pursuing an argument which conflicted with the district court's "settled law."

Imposing sanctions solely on the ground that a nonbinding, unappealed district court decision establishes the law of the circuit and renders contrary legal arguments frivolous is really nothing more than the kind of post hoc reasoning that this Court specifically admonished against in *Christianburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 421-22 (1978):

> [I]t is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his actions must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.

Basing sanctions on the holding of another district court case grossly distorts the purposes of Rule 11 and chills attorneys from pursuing reasonable legal arguments that have yet to be subjected to appellate review. This directly conflicts with the express language of both Rule 11 and Rule 3.1 of the American Bar Association's Model Rules of Professional Conduct, which provides in relevant part:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for the extension, modification or reversal of existing law.

This Court should grant the petition before the Seventh Circuit's rule further chills ethical advocacy.

II. This Court Should Also Grant The Petition To Resolve The Split Among The Circuits As To Whether Abuse Of Discretion Or De Novo Review Is Required When District Courts Impose Rule 11 Sanctions Based On Allegedly Frivolous Legal Claims

The Courts of Appeals are split as to the proper standard of review for Rule 11 sanctions involving frivolous legal (rather than factual) claims: six circuits review for abuse of discretion, four circuits review de novo.

The First, Fourth, Fifth, Sixth, Eighth and Tenth Circuits review a district court's decision to impose sanctions for frivolous legal claims under an abuse of discretion standard. *EBI, Inc. v. Gator Industries, Inc.*, 807 F.2d 1, 6 (1st Cir. 1986); *Forrest Creek Associates v. McLean S & L Assn.*, 831 F.2d 1238, 1244 (4th Cir. 1987); *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 871 (5th Cir. 1988) (en banc); *Century Products, Inc., v. Sutter*, 387 F.2d 247, 253 (6th Cir. 1988); *O'Connell v. Champion International Corp.*, 812 F.2d 393, 395 (8th Cir. 1987); and *Cotner v. Hopkins*, 795 F.2d 900, 903 (10th Cir. 1986).

The Second, Ninth, Eleventh and D.C. Circuits review the same legal conclusion de novo. *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986); *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc); and *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985).

Different panels of the Seventh Circuit have applied different standards of review to findings of legal frivolous claims. The abuse of discretion standard was applied in this case, App., *infra*, at D-9[1]; *In re Ronco*, 838 F.2d 212 (7th

[1] In its second opinion in this case, the court of appeals held that the question of whether the *de novo* standard of review applied to the district court's finding that plaintiffs' legal arguments were frivolous need not be addressed because the

(footnote continued on next page)

Cir. 1988); and *R.K. Harp Inv. Corp. v. McQuade*, 825 F.2d 1101 (7th Cir. 1987). Sanctions were reviewed de novo in other cases. *Brown v. Federation of State Medical Boards*, 830 F.2d 1429 (7th Cir. 1987); *Flip Side Productions v. Jam Productions, Ltd.*, 843 F.2d 1044 (7th Cir. 1988). The Seventh Circuit has recently heard this issue en banc. *Mars Steel Corporation v. Continental Illinois National Bk. & Tr. Co.*, (No. 88-1554; rehearing en banc June 15, 1989).

The split of authority among the circuits has prevented the uniform application of the Rule and led to a wide disparity in the way the Rule has been applied.[2] "In interpreting and applying Rule 11, the courts have become a veritable Tower of Babal." W. Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013, 1015 (1988).

Rule 11 has been transformed from a safeguard against the abuse of the litigation process into a lightning rod for ancillary proceedings. Schwarzer, 101 Harv. L. Rev. at 1013: "Rule 11 has become a significant factor in civil

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(footnote continued from preceding page)

previous determination was the law of the case. App., *infra*, at F-4. However, in its initial opinion (which is properly before this Court) the court of appeals applied the abuse of discretion standard. App., *infra*, at D-9. Obviously, if a different standard of review was required in the second appeal, application of the law of the case doctrine would have been inappropriate. By holding that its previous decision that the district court did not abuse its discretion in finding plaintiffs' claims frivolous for purposes of 42 U.S.C. § 1988 established the law of the case as to frivolousness for Rule 11 purposes, the court of appeals held that the abuse of discretion standard applies in Rule 11 cases.

[2] According to Professor Grosberg, in the first two years under the amended Rule 11, 12.2% of attorney sanctions were imposed by only 3 (of 684) federal judges: Judges Shadur (N.D.Ill.) (the district judge in this case), Schwarzer (N.D.Cal.) and Haight (S.D.N.Y.). Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 Vill. L. Rev. 575, 587 n.42 (1987).

litigation, with an impact that has likely exceeded its drafters' expectations." In certain circuits, Rule 11 has had a profoundly chilling impact on creative litigation, particularly in the field of civil rights, that extends far beyond the balanced deterrence sought by the framers of the Rule. *Hill v. Norfolk and Western Railway Co.*, 814 F.2d 1192, 1203 (7th Cir. 1987) (Parsons, J., dissenting).

A uniform standard of appellate review is needed to promote the uniform application of the Rule and to provide guidance for the district courts. Nonuniformity creates disparate results and undercuts the important principles of notice and fairness. Nonuniformity also undermines the general deterrent effect of the Rule.

CONCLUSION

Petitioner respectfully requests that the petition for writ of certiorari be granted and that this cause be remanded for further review de novo, with direction that *Hamer v. Anderson* can not be used to support a finding that petitioner's legal arguments were frivolous or that petitioner was on notice of a potential Rule 11 violation.

Marshall Patner
Petitioner

MARSHALL PATNER
JEREMY HOBBS
DAVID HURWITZ
135 South LaSalle Street
Chicago, IL 60603
(312) 641-3355

APPENDIX A

Rule 11, Federal Rules Of Civil Procedure:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

APPENDIX B

28 U.S.C. § 1927:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARGARET COLEMAN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 78 C 2117
	)	
ROBERT McLAREN, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This Court's October 7, 1985 memorandum opinion and order ("Opinion III" 1/) dismissed this action for want of subject matter jurisdiction under Rule 12(b)(1), by reason of the Tax Injunction Act of 1937 (the "Act," 28 U.S.C. §1341) and the more expansive bar imposed by Fair Assessment in Real Estate Association, Inc. v. McNary, 454 U.S. 100 (1981). Now the "Lake County Defendants" (Lake County itself, its Board of Review and Robert Jasper) ask for the allowance of a portion of their reasonable attorneys' fees and expenses, to be charged against Lake County plaintiffs Paul and June Hamer ("Hamers") or their lawyers or both under 42 U.S.C. §1988 ("Section 1988"). For the reasons stated in this memorandum opinion and

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1/ Opinion I, 98 F.R.D. 638 (N.D. Ill. 1983) dealt with the initial complex class certification issues, involving (1) an asserted plaintiff class and several subclasses and (2) asserted defendant classes in addition to the individual defendants. Plaintiffs won only to a limited extent, losing on most issues. Opinion II, 572 F.Supp. 178 (N.D. Ill. 1983) denied defendants' Fed. R. Civ. P. ("Rule") motion to dismiss the Complaint for failure to state a claim upon which relief can be granted.

order, Lake County Defendants' motion is granted.

Prevailing defendants in 42 U.S.C. §1983 ("Section 1983") lawsuits [2] have a substantial hurdle to overcome to recover their litigation expenses: It is not enough just to win, for they must show plaintiffs' claim was "frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978). [3] Here Lake County Defendants urge a variant on that theme. They say even if Hamers' claim did not initially fit that description of emptiness, it surely did after Judge Aspen's decision against Hamers themselves in Hamer v. Anderson, 594 F.Supp. 561 (N.D. Ill. 1984). If so, that meant

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[2] Hamers' counsel continue to betray the same kind of inability to apply legal doctrine that marked their earlier unsuccessful briefing on the jurisdictional issues. Their Mem. 4 n.4 cites Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) for this claimed proposition:

> It seems questionable whether a defendant who "prevails" on a jurisdictional motion is a "prevailing party" under 42 U.S.C. 1988.

That is not a fair reading of Hensley. Our own Court of Appeals had previously held squarely to the contrary in Werch v. City of Berlin, 673 F.2d 192, 194-95 (7th Cir. 1982), and though Werch was pre-Hensley, the Court of Appeals for the Fourth Circuit has made the identical holding post-Hensley in Hutcherson v. Board of Supervisors of Franklin County, Virginia, 742 F.2d 142, 146 (4th Cir. 1984), cert. denied, 105 S.Ct. 1358 (1985).

[3] Though Christiansburg Garment was a Title VII case, the Supreme Court shortly thereafter made plain the applicability of the identical principles and standards to govern the potential assessment of fees against unsuccessful plaintiffs in Section 1983 actions. Hughes v. Rowe, 449 U.S. 5, 14-15 (1980)(per curiam).

they "continued to litigate after [their claim] clearly became [frivolous, unreasonable, or groundless]" (Christiansburg Garment, 434 U.S. at 422). Thus Lake County Defendants ask to recover not all of their fees and expenses, but only those incurred after September 27, 1984 (the date of Judge Aspen's Hamer decision).

Of course any such mechanical rule hinging solely on Judge Aspen's decision overstates the case. 4/ In the federal system only the Supreme Court is omniscient. No litigant is required to lie down and play dead just because a district court judge (or, for that matter, a court of appeals panel) has previously ruled the other way on the legal position the litigant now seeks to advance. Intercircuit conflicts are all too common--and that certainly applies a fortiori to differences of view among district courts. Even were that not the case, the salutary principle in Code of Professional Responsibility

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4/ Hamers' counsel, however, are at least equally guilty of overstating their case. Their Mem. 5-6 claims Hamer should not be taken into account because it involved a different attack on the Illinois tax refund system--that it was somehow a "sideshow" to this lawsuit's "main event." That argument is specious at best. Though the nature of Hamers' particular onslaught in Hamer was different from the many-faceted assaults in this case, the legal question whether Illinois afforded a "plain, speedy and efficient" remedy, dealt with by Judge Aspen in Hamer, was the same as here--and equally importantly, many of the facts on which Hamers relied there were identical to those advanced here. Hamers and their lawyers seem to have blinded themselves to the parallels between the two cases, just as they previously blinded themselves to the lack of substance in their arguments supporting claimed subject matter jurisdiction here.

DR 7-102(A)(2) and in Model Rule of Professional Responsibility 3.1 allows counsel to make a "good faith argument for an extension, modification or reversal of existing law"--and the same concept should extend to create Section 1988 nonliability. Accordingly Hamer may be a factor to be taken into account (as possible evidence of Hamers' frivolousness, unreasonableness or groundlessness in the present case), but it surely is not determinative.

Consequently this opinion will deal with the Christiansburg inquiry as of the date for which Lake County Defendants contend--September 27, 1984--but it will view the fact of Judge Aspen's decision as an element in the equation, rather than treating the decision itself as controlling. 5/ Some six months before Hamer this Court (in the course of a Mar. 19, 1984 procedural ruling (Tr. 3-7) on objections to a Magistrate's recommendation) warned plaintiffs' counsel their claim could be in serious trouble based on the Supreme Court's decisions in Rosewell v. LaSalle National Bank, 450 U.S. 508 (1981) and in McNary. Then shortly after Hamer was decided, Lake County Defendants' counsel wrote plaintiffs' attorneys a reasoned and detailed letter urging them to desist from further proceedings

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5/ Lake County Defendants argue in part that Hamer controls here on res judicata grounds (an argument they had also made in the briefing that led to Opinion III). Because Lake County Defendants' Rule 12(b)(1) motion was successful on other grounds, Opinion III did not rule on their res judicata argument (see Opinion III at 6).

here (see App. 1). Plaintiffs' lead counsel shot back a rejection (see App. 2) by return mail (so much for Lake County Defendants' request to "Think about it," contained in the App. 1 letter to which plaintiffs' counsel was responding).

This is not then a case in which a Section 1983 plaintiff is met with an unanticipated motion for fees under Section 1988. By continuing to litigate after such fair warning, Hamers must be deemed to have proceeded at their peril--if, of course, their claims then failed the test of nonfrivolousness. This opinion turns to that question.

When this Court inherited this action as part of its original calendar in June 1980, the lawsuit was over two years old. It had been filed when the Act had not yet been the subject of definitive readings by the Supreme Court. Certainly the professions of good faith filing now made by plaintiffs' counsel (Futterman Aff. ¶2) were reasonable not only subjectively but objectively. During a short span of two years after this case had come to this Court, however, the Supreme Court made plain the parameters of actions like Hamers' in no fewer than three cases: Rosewell, McNary and California v. Grace Brethren Church, 457 U.S. 393 (1982). And in the same period the Supreme Court decided in Hughes that the Section 1988 standard for awarding attorneys' fees to defendants was objective nonfrivolousness, not subjective good faith.

Those decisions (either with or without this Court's later decision in Axelrod v. Earhart, 565 F.Supp. 549 (N.D. Ill.

1983) and Judge Aspen's opinion in Hamer) sap all vitality from the current representations by Hamers' counsel (Futterman Aff. ¶¶3-6) that they continued to pursue the Holy Grail in an honest belief in Hamers' claims. 6/ At least by the time Hamer was decided, any such belief represented what has been termed the "empty head, pure heart" syndrome. 7/

6/ In Hamers Mem. 1 & n.1 their counsel make a point (in support of their "good faith" argument) of the fact that they have not only handled this litigation on a wholly contingent-fee basis but have advanced all but a nominal amount of the expenses as well. This Court should not be misunderstood as criticizing the contingent-fee practice, which can serve a constructive social purpose in allowing colorable claims to be litigated when the clients could not otherwise finance the all-too-high costs of litigation today. But what Hamers' counsel fail to recognize is that their financial arrangement, which effectively converts their position to that of clients, poses a serious risk of loss of the objectivity that should attend a lawyer's role (remember the adage that "A lawyer who represents himself has a fool for a client").

7/ That phrase or its close variants (e.g., "good heart but an empty head," Walton v. United Consumers Club, Inc., Nos. 84-2616 and 85-2011, slip op. at 16 (7th Cir. Mar. 11, 1986)) has been employed in a good many contexts where "good faith" is judged by objective rather than subjective standards, id. One of those instances, for example, marks the change from (1) the earlier incarnation of Rule 11 (when subjective good faith was enough to avoid imposition of fees--hence "empty head, pure heart" was enough to forestall liability) to (2) the present version of Rule 11 (which applies an objective view, so the "empty head" prevails over any "pure heart" to create liability). As with Rule 11 (Frazier v. Cast, 771 F.2d 259, 265 n.4 (7th Cir. 1985)) and 28 U.S.C. §1927 (In re TCI Ltd., 769 F.2d 441, 445 (7th Cir. 1985)) and Title VII cases (Christiansburg Garment, 434 U.S. at 421-22), the objective rather than subjective approach applies under Section 1988 as well. Hughes, 449 U.S. at 14-15.

Perhaps recognizing (though they do not acknowledge) their claimed subjective good faith cannot do the job, Hamers' counsel struggle in a number of ways to escape the toils of Section 1988 liability. None is any more successful than the "good faith" argument already rejected:

1. Invoking language in Ekanem v. Health & Hospital Corp. of Marion County, Indiana, 724 F.2d 563, 574 (7th Cir. 1983), cert. denied, 105 S.Ct. 93 (1984), Hamers' counsel point to this Court's Opinion I certifying in part the requested plaintiffs' classes. In like manner, counsel advert to this Court's denial of the motion to dismiss in Opinion II. But in each instance this Court simply accepted--as it had to for purposes of the motions--the Complaint's allegations (necessarily unsupported by facts at that stage) that Illinois did not provide a "plain, speedy and efficient remedy." Thus nothing in those procedural rulings has any probative force in judging whether years later, after all the facts were in, Hamers and their counsel should have known that no colorable basis existed for those allegations.

2. Hamers Mem. 4 also refers to the issuance of this Court's "favorable discovery ruling," in an effort to call into play the same language in Ekanem. But the ruling to which they refer was a miniscule one, implicating no view at all as to the soundness of Hamers' position on the issues that control here. Moreover it is worth noting the

exceedingly low threshold a litigant must surmount generally to be entitled to such discovery: not admissibility into evidence of the information itself, but simply the reasonable likelihood of its leading to the discovery of admissible evidence (Rule 26(b)(1)).

3. Hamers Mem. 3 refers to settlement discussions by other defendants before Opinion III issued. But this litigation had then been going on for years, and all defendants knew they were facing stubborn adversaries who (given their counsel's contingent-fee representation) were incurring no legal expenses for their continued draining of the resources of small governmental-unit defendants (scarcely litigants of the deep-pocket category). Under those circumstances, the settlement efforts may have represented nothing more than such defendants' pragmatic judgment that it would be better to accept non-onerous terms than to continue to be bled white by the litigation process. There is nothing to support the inference that anything more was involved than nuisance value or an effort to avoid the cost of litigating plaintiffs' theories, rather than such defendants having a different perception of the merits than Opinion III thereafter took.

In summary, then, none of the factors urged by Hamers brings this case within the ambit of such decisions as Ekanem (which denied attorneys' fees under non-parallel circumstances) or Badillo v. Central Steel & Wire Co., 717 F.2d 1160, 1163-65

(7th Cir. 1983)(in which the Court of Appeals upheld this Court's denial of attorneys' fees to the prevailing defendant). Instead this case calls for consideration of the possibility identified in Hermes v. Hein, 742 F.2d 350, 357-58 (7th Cir. 1984) "that this suit may have become frivolous or vexatious at some point during the litigation." It thus only remains to review whether "at some point during the litigation" (more specifically, by September 27, 1984) Hamers' actual arguments as to subject-matter jurisdiction met the standard of nonfrivolousness required to avoid Section 1988 liability.

Because Opinion III dealt with Hamers' contentions at such great length, 8/ this opinion will not repeat that process. Suffice it to say that many of Hamers' arguments represented flat-out misreading or misapplications of controlling authority (most frequently Rosewell); in other respects Hamers ignored the clear impact of Grace Brethren; in still others the statute of limitations principle confirmed in Hamer barred Hamers' contentions in this action; 9/ and the remaining aspects of

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8/ Nothing should be inferred as to the force of Hamers' arguments from the fact Opinion III occupied something more than 30 typewritten pages. Though the arguments were really empty, there were so many of them it required a lot of space to dispose of them. For example, Hamers' memorandum in response to Lake County Defendants' Rule 12(b)(1) motion alone ran over 40 pages--and the documentary materials this Court also had to go through were substantial indeed.

9/ Opinion III at 18-20 so held, though as previously stated this Court did not have to decide whether Hamer represente a total bar of Hamers' claim on limitations grounds.

Hamers' claim were patently wanting in substantive terms as well. This Court has reviewed and applied to Hamers' situation the criteria identified in such cases as Munson v. Friske, 754 F.2d 683, 696-97 (7th Cir. 1985) in light of Opinion III, and it finds Hamers' claims wanting in every respect at least by September 27, 1984. In sum, it was not only that Hamers' positions were patently without merit not later than that date, but--as required for liability under Christiansburg--they were frivolous and groundless in the legal sense.

Accordingly Hamers and their lawyers are held jointly and severally liable to Lake County Defendants for their attorneys' fees and expenses incurred after September 27, 1984. On or before April 8, 1986 Hamers are ordered to advise this Court and opposing counsel as to the extent, if any, that they contest the reasonableness of the claimed fees (either the time involved, the hourly rates, or the reasonableness of applying those rates on a straight time basis) or expenses. This Court will then establish any procedures necessary to determine the amount of the award.

Milton I. Shadur
United States District Judge

Date: March 25, 1986

APPENDIX D

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-2485

PAUL HAMER and JUNE HAMER,

Plaintiffs-Appellants,

v.

COUNTY OF LAKE, LAKE COUNTY BOARD OF REVIEW, and its individual members, and ROBERT G. JASPER,

Defendants-Appellees,

AND APPEAL OF:

JACK URETSKY and MARSHALL PATNER.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 78 C 2117—Milton I. Shadur, *Judge.*

ARGUED MARCH 3, 1987—DECIDED MAY 15, 1987

Before WOOD, JR., RIPPLE, and MANION, *Circuit Judges.*

WOOD, JR., *Circuit Judge.* The plaintiffs, Paul and June Hamer, and their attorneys, Jack Uretsky and Marshall Patner, challenge the award of attorney's fees and expenses entered against them pursuant to 42 U.S.C. § 1988 in this civil rights action for review of state tax assessment procedures. For the reasons stated below, we affirm in part, reverse in part and remand for further proceedings.

I

In the interests of comity and federalism, district court jurisdiction over state tax matters is dependent upon a finding that the applicable state procedures of review do not satisfy the requirements of the Tax Injunction Act (28 U.S.C. § 1341). *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981); *Fromm v. Rosewell*, 771 F.2d 1089 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1188 (1986). The Tax Injunction Act requires state taxpayers to turn to state remedies for protection of their federal rights provided the state remedies are "plain, speedy and efficient."[1]

The plaintiffs brought suit in May 1978 under 42 U.S.C. § 1983 challenging the adequacy of the Illinois tax assessment procedures on equal protection and due process grounds.[2] Specifically, the plaintiffs sought to prove that the state procedures, as applied in all Illinois counties except Cook County, failed to provide an adequate means for addressing disparities in property tax assessments.[3]

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[1] The Tax Injunction Act (28 U.S.C. § 1341) provides:

> The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

[2] The plaintiffs' suit was certified as a class action under Fed. R. Civ. P. 23. *Coleman v. McLaren*, 98 F.R.D. 638 (N.D. Ill. 1983). The two plaintiff classes included all overassessed Lake County and DuPage County taxpayers; the Hamers were named as representatives of the class of Lake County taxpayers. When the defendants moved for an award of attorney's fees, they sought to recover against the Hamers specifically (and their attorneys) rather than against the entire class, thus accounting for the change in the caption to *Hamer v. County of Lake*, No. 86-2485. We do not address the implications of assessing attorney's fees against the class representatives alone because that issue was not raised for our consideration. *Cf. Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30*, 86 F.R.D. 500, 503-04 (N.D. Cal. 1980).

[3] This argument stems from language in the Illinois Constitution, Art. IX, § 4, which sets forth the requirement of tax uniformity.

(Footnote continued on following page)

About one year later, the Hamers filed another suit in district court, in which they were again named the representatives of a class of taxpayer plaintiffs, charging that Illinois taxpayers were entitled to interest on property taxes wrongfully collected by the State. *See Hamer v. Anderson*, 594 F. Supp. 561 (N.D. Ill. 1984).

In 1981, the Supreme Court issued a decision severely limiting the scope of recovery under the Tax Injunction Act in a case which addressed the Illinois system of property tax assessment review as applied in Cook County. *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981).[4] The Court in *Rosewell* narrowed the scope of federal review in tax assessment cases by exclusively focusing on the procedural adequacy of state remedies. With the proper procedures in place, the case holds, any possible violations of a substantive federal right are adequately protected because the federal issue can be heard in the state courts and possibly on review to the United States Supreme Court (28 U.S.C. § 1257). The state remedy is thus considered "plain, speedy and efficient," if the state procedures do not "preclude presentation and consideration of federal rights." *Id.* at 514-15.

Therefore, in *Rosewell* the Court did not decide whether Illinois taxpayers were entitled to interest on their refunds, as the plaintiff asserted, because it found the argu-

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[3] *continued*

See People ex rel. Hawthorne v. Bartlow, 111 Ill. App. 3d 513, 444 N.E.2d 282 (4th Dist. 1983); *Stephens v. State Property Tax Appeal Board*, 42 Ill. App. 3d 550, 356 N.E.2d 355 (4th Dist. 1976). Thus, Illinois law provides that the assessed valuation of real estate must be uniform across taxing district lines. Ill. Rev. Stat. ch. 120, para. 589.1 (1986). The plaintiffs asserted that the local county assessments failed to comply with this uniformity requirement and instead resulted in wide variations in "assessment ratios" (the ratio of the assessed value of real estate to its market value).

[4] *See* Ganz, Laswell, Review of Real Estate Assessments—Cook County (Chicago) v. Remainder of Illinois, 11 John Marshall J. Prac. & Proc. 19, 74-77 (1977), for a detailed comparison of the procedures applied in Cook County versus the State's other counties.

ment raised a substantive federal right to a tax refund which could be adequately litigated in state court. *Id.* The Court instead addressed the procedural issue concerning alleged delays in the refund process. Although decided by a divided Court, the majority opinion held, "[t]here is no doubt that the Illinois refund procedure provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax." *Id.* [quoting *LaSalle National Bank v. Cook County*, 57 Ill. 2d 318, 324, 312 N.E.2d 252, 255-56 (1974)].[5]

In response to the *Rosewell* decision, the plaintiffs filed a thirty-four page amended complaint which included allegations that the state procedural mechanism failed to provide an adequate means to raise objections to assessment disparities. For example, the plaintiffs referred to limitations on the right to discovery, the alleged absence of a standard of proof in administrative proceedings, delays in the system as applied in selected counties, as well as other alleged inadequacies. The case then proceeded through discovery for about two years until July 1983, when the plaintiff classes were certified. On October 4, 1983, the district court denied the defendants' motion to dismiss for failure to state a claim for relief. *See Coleman v. McLaren*, 572 F. Supp. 178 (N.D. Ill. 1983). And also in October 1983, the district court granted the parties leave to continue to proceed with discovery on the limited issue of the court's jurisdiction over the claims under the Tax Injunction Act.

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[5] Justice Blackmun, who cast the deciding vote in *Rosewell*, stated in his concurring opinion that "[t]he Court's opinion demonstrates, I think, that the remedy provided by Illinois law qualifies, though perhaps only barely, as 'plain, speedy and efficient,' within the meaning of the Tax Injunction Act, and that federal jurisdiction to grant injunctive relief is therefore statutorily barred." *Rosewell*, 450 U.S. at 529. Given the Court's divided opinion with respect to the adequacy of Illinois procedures and the reservations expressed in Justice Blackmun's deciding vote, we do not believe that the plaintiffs' specific objections to the Illinois procedures were wholly unreasonable prior to the *Hamer v. Anderson* decision.

In March 1984, the district court, while ruling on objections to a magistrate's recommendation with respect to discovery, cautioned the plaintiffs that their claims were of questionable merit in light of *Rosewell* and a major decision issued the same year as *Rosewell*, *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981), which also limited recovery in state tax assessment cases.[6] In *McNary*, the Court extended the "plain, speedy and efficient" test to cover suits seeking damages under Section 1983, not only injunctive relief. The next year, the Court also decided *California v. Grace Brethren Church*, 457 U.S. 393 (1982), which held that a state remedy may be "plain, speedy and efficient" despite the absence of state injunctive relief.

Next, on September 27, 1984, the district court issued its decision in the related case of *Hamer v. Anderson*, and held that the Illinois procedures, as applied in the same counties which were the subject of the present suit, were "plain, speedy and efficient." *Hamer*, 594 F. Supp. at 563. Following the Supreme Court's statement in *Rosewell*, 450 U.S. at 514, the district court also held that the right to interest on a tax refund addressed a substantive federal issue not subject to review under the Tax Injunction Act. *Hamer*, 594 F. Supp. at 564. In response to this decision, the defendants' counsel in this case wrote the plaintiffs' attorneys and suggested that the suit be dropped in light of the holding that the Illinois procedures

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[6] At the district court hearing, Judge Shadur stated, in part:

> But, counsel, if it becomes plain that you are kicking a horse that is not dead, is moribund, then it seems to me you ought to give some hard thought to whether constructive purposes are being served by the further thrashing around of these issues.
>
> You know, I am not speaking to that one because I don't know what the facts are on the current status. All I am telling you is that if it turns out to be as advertised, there is a serious problem with staying in this court.

Discovery Trans., at 6-8 (March 19, 1984).

satisfied the requirements of the Tax Injunction Act.[7] The plaintiffs' counsel flatly refused the defendants' suggestion.

In October 1985, the district court rejected the plaintiffs' claims challenging the alleged lack of assessment uniformity and found the state procedures of review to be "plain, speedy and efficient." The district court thus dismissed the case for lack of subject matter jurisdiction in a lengthy and well-reasoned opinion specifically addressing each alleged error in the Illinois procedures. The court found that the bulk of the complaint addressed alleged violations of substantive rights—a claim found inappropriate in *Rosewell* given the existence of adequate state review. The remaining procedural concerns were found to lack substantial factual merit or were alternatively held to be "plain, speedy and efficient." The district court decision was adopted as the opinion of this court on appeal. *Coleman v. McLaren*, 631 F. Supp. 749 (N.D. Ill. 1985), *aff'd*, 796 F.2d 477 (7th Cir. 1986) (unpublished order).

The government and other defendants then petitioned for $19,608.28 in attorney's fees and expenses pursuant to 42 U.S.C. § 1988 to cover the costs incurred in litigating the suit after September 27, 1984, the date of the decision in *Hamer v. Anderson*.[8] The district court granted the motion after carefully reviewing the request, which it deemed in part to be excessive and in part overreaching. The court then limited the fees and expenses

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[7] The defendants' letter, dated October 18, 1984, was sent to Jack Uretsky, Marshall Patner, Ronald Futterman, and Jeffrey Lerner, the four attorneys representing all the *Coleman* class members. Mr. Uretsky and Mr. Patner represented the Lake County class of taxpayers. Mr. Uretsky represented the same class of plaintiffs in *Hamer v. Anderson* as well. The letter set forth the defendants' position that the plaintiffs' claims were "unreasonable, vexatious, and frivolous" and warned of the possibility of recovering an attorney's fees award.

[8] The defendants sought to recover fees under Section 1988 against either the Hamers, their lawyers, or both the Hamers and their lawyers.

to $11,195.61.[9] The court reasoned that the *Rosewell* decision, followed by *Hamer v. Anderson*, provided clear and unambiguous precedent which rendered the plaintiffs' claims frivolous and unreasonable under Section 1988. The court stated that both decisions conclusively established that substantive federal claims of the sort pursued by the plaintiffs were not properly cognizable in federal court under the Tax Injunction Act. The decisions also disposed of any concerns over the procedural adequacy of the Illinois system of review. In addition, the court held that *Hamer v. Anderson* provided an appropriate point from which to assess fees given the prior decisions of the Supreme Court. Finally, the court ordered the grant of fees and expenses to be charged jointly and severally under Section 1988 against the Hamers and both their attorneys, Marshall Patner and Jack Uretsky.

On appeal, the plaintiffs do not dispute the reduced amount of the award, but rather claim: (1) that it was improper, as a matter of law, to grant attorney's fees to the "prevailing defendants" where a development in the law during the course of the litigation renders the litigation unreasonable, regardless of whether the award is limited to the fees incurred after the change in the law; and, alternatively, (2) that the district court abused its discretion in awarding attorney's fees under the present circumstances because the law was not sufficiently clear to render the plaintiffs' claims frivolous.[10]

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[9] The total time allowed (131 hours) was 48.4 hours less than the defendants requested. And the requested hourly rate of $125.00 for the services of the State's attorneys was reduced to $85.00 per hour. The defendants do not cross-appeal from this decision. Nor do the defendants appeal from the court's decision not to address the possible *res judicata* effect of the *Hamer v. Anderson* decision.

[10] Before proceeding to discuss the merits of these arguments, it is necessary to provide a brief review of the procedures which were at issue in this case. The tax assessment process in Illinois begins when the township assessor appraises the value of a tax-

(Footnote continued on following page)

II

While prevailing plaintiffs are entitled to attorney's fees under 42 U.S.C. § 1988 "if they succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit," *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), prevailing defendants must satisfy much more stringent standards to recover fees against plaintiffs in a civil rights action. The test set forth in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978), states that "a plaintiff should not be assessed the opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* at 422; *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (per curiam); *Coates v. Bechtel*, 811 F.2d 1045, 1049 (7th Cir. 1987); *Vandenplas v. City of Muskego*, 797 F.2d 425, 428 (7th Cir. 1986). *Christiansburg* also held that defendants are

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[10] *continued*

payer's real estate. *See* Ill. Rev. Stat. ch. 120, para. 524 (1986). Pursuant to Paragraph 584, each property owner is then issued a notice stating, among other things, the median level of assessment in the relevant district and informing the taxpayer of the right to appeal the assessment to the County Board of Review ("Board"). If the taxpayer decides to challenge the assessment, he or she must file a complaint with the Board (Paragraph 589), which will then hold a hearing and issue written notice of its decision. If the taxpayer then wishes to challenge the Board's decision he or she may either appeal to the Illinois Property Tax Appeal Board ("PTAB"), under Paragraph 592.1, or pay the tax under protest and then file a tax objection when the County Collector files an application for judgment in the circuit court (Paragraphs 675, 716). An adverse PTAB decision may be appealed to the circuit court (Paragraph 592.4) and then, if necessary, through the Illinois appellate courts. *See* Ill. Rev. Stat. ch. 110, para. 3-112. Similarly, the taxpayer may seek review in the Illinois appellate courts from an adverse judgment in the circuit court on a tax objection to the County Collector's application for judgment. Finally, review in the United States Supreme Court is available by writ of error from the state courts. 28 U.S.C. § 1257; *Pennsylvania v. Ritchie*, 107 S. Ct. 989, 992 (1987).

not required to show either subjective or objective bad faith on the part of the plaintiffs to recover attorney's fees under Section 1988. 434 U.S. at 421. It is sufficient if the plaintiff's claim is "meritless in the sense that it is groundless or without foundation." *Hughes*, 449 U.S. at 14. Finally, it is well-settled that the district courts are given wide latitude to determine whether an award of fees to prevailing defendants is appropriate in a given case. Thus, the decision to impose attorney's fees is reviewed for an abuse of discretion. *Muskego*, 797 F.2d at 428.

The *Christiansburg* test is intended to strike a balance between the need to eliminate the possible "chilling effect" on civil rights plaintiffs, who may decide not to pursue a meritorious suit for fear of suffering a fee award, and the goal of deterring plaintiffs from filing frivolous claims. *Coates*, 811 F.2d at 1049-50; *Eichman v. Linden & Sons, Inc.*, 752 F.2d 1246, 1248 (7th Cir. 1985). In actual practice, however, a perfect balance is often difficult to achieve given the importance of both of these concerns and the inherent tension between them—an issue which is becoming more apparent as courts increasingly resort to sanctions in an effort to limit the amount of frivolous litigation. Under the circumstances, the Supreme Court's instructions with respect to this issue bear repeating:

> [I]t is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.

Christiansburg, 434 U.S. at 421-22. For the benefit of the district courts, we would only add that their effort to control the amount of frivolous litigation must not lose sight of the dictates of Congress which call for an aggressive and creative attack by civil rights plaintiffs, the "private attorney generals," to vigorously pursue enforcement of

our civil rights laws. *Id.* at 416. It is often through vigorous advocacy that changes and developments in the law occur and new precedent is created. Innovative, even persistent advocacy in the face of great adversity must not be unreasonably penalized with hindsight. Subsequent failure is not the test. There is no time, however, for litigation that is clearly frivolous. When passing on possible frivolous advocacy, judges would do well to remember their own days of advocacy with all its attendant tribulations. The judicial and advocacy perspectives are not necessarily the same. In this case, however, Judge Shadur carefully and considerately developed the attorney's fee sanctions in model fashion. We find no fault whatsoever with his general approach.

Attorney's fees may be awarded to prevailing defendants under *Christiansburg* when plaintiffs pursue a claim which is frivolous in light of unambiguous case law, just as a fee award is appropriate when a suit is found to lack sufficient basis in fact. *See, e.g., Hamilton v. Daley*, 777 F.2d 1207, 1212-13 (7th Cir. 1985); *Werch v. City of Berlin*, 673 F.2d 192, 195 (7th Cir. 1982). For similar reasons, sanctions have been imposed under Fed. R. App. P. 38 when a party insists on litigating an issue in the face of controlling precedent. *See, e.g., District No. 8 International Ass'n of Machinists & Aerospace Workers v. Clearing*, 807 F.2d 618, 623 (7th Cir. 1986); *Reid v. United States*, 715 F.2d 1148, 1154 (7th Cir. 1983); *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1269-70 (7th Cir. 1983). As this court stated in *Hamilton*, "it is the responsibility of counsel to know the law and to know whether a claim is clearly foreclosed by precedent." *Hamilton*, 777 F.2d at 1212. Given the difficulty of determining whether the case law in a given case is sufficiently clear so that it renders an argument frivolous, this court has carefully examined fee awards based on this theory. *See, e.g., LeBeau v. Libbey-Owens-Ford Co.*, 799 F.2d 1152, 1163 (7th Cir. 1986); *Vandenplas*, 797 F.2d at 430.

The plaintiffs assert that the district court erred by imposing fees in this case because it was only after the suit

was filed that certain legal developments clarified the state of the law. Thus, they argue, the reasonableness of the claim may only be determined with respect to the state of the law as it existed at the outset of the litigation.[11] The plaintiffs concede, as they must, that factual developments arising during the course of the litigation can render a suit frivolous and thus justify an award of fees in the event the plaintiff proceeds with the case. The plain wording of *Christiansburg*, directing that an award of fees is appropriate where the claim is frivolous or when "the plaintiff continued to litigate after it clearly became so," clearly requires as much. *Christiansburg*, 434 U.S. at 422; *see also Coates*, 811 F.2d at 1053; *Hermes v. Hein*, 742 F.2d 350, 357 (7th Cir. 1984); *Ford v. Temple Hospital*, 790 F.2d 342, 350 (3d Cir. 1986).

However, the plaintiffs claim that a similar rule with respect to legal developments is distinguishable. Although there may be some surface appeal to a fact/law distinction, the argument quickly loses its appeal in view of the fact that an award of fees is only permitted when litigation proceeds in the face of controlling and unambiguous precedent. All reasonable doubts regarding the merits of the claim are resolved in favor of the plaintiff. In addition, because the award of fees under these circumstances is limited to the costs incurred after the point at which it became unreasonable to pursue the suit, the plaintiffs' argument is not persuasive in light of the otherwise indis-

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[11] The plaintiffs assign great weight to a decision of the Fifth Circuit, *Holloway v. Walker*, 784 F.2d 1294 (5th Cir.) (per curiam), *cert. denied*, 107 S. Ct. 571 (1986), which upheld the denial of the defendant's attorney's fees and states that the "[e]volution of the law during the pendency of litigation is an insufficient basis for a claim of frivolity." *Id.* at 1296. However, it is clear that the language quoted from *Holloway* is taken out of context. The defendant in *Holloway*, a judge sued in his official capacity apparently for injunctive relief, did not present a request for fees incurred after the relevant development in the law, *see Hudson v. Palmer*, 468 U.S. 517 (1984), but sought to recover fees for costs incurred from the outset of the litigation.

tinguishable cases which have upheld fee awards when the legal frivolity was apparent from the outset of the suit. *See, e.g., Hamilton*, 777 F.2d at 1213. Therefore, the plaintiff's first argument is without merit.[12]

In the alternative, the plaintiffs assert that the district court abused its discretion in finding that the intervening law at issue in the present case was so clear and controlling that the plaintiffs' insistence on pursuing their claims was unreasonable. Thus, we turn to the question whether the plaintiffs presented any reasonable arguments challenging deficiencies in the state procedures themselves rather than arguing substantive federal issues which we agree were clearly frivolous. The plaintiffs raise the following specific procedural objections which they claim were not well-settled by the prior case law.

The plaintiffs first argue that the Illinois scheme is not "plain" because of uncertainty involving the availability of discovery in tax objector cases. It is apparently the policy of certain circuit courts not to permit discovery in tax objection proceedings. *Coleman*, 631 F. Supp. at 756 n.16. The district court stated that the argument, in effect, focused on a substantive federal right to discovery,

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[12] The decision to award attorney's fees as a result of an intervening development in the law is not without some precedent. Under similar circumstances, the Fourth Circuit in *Hutcherson v. Board of Supervisors of Franklin County*, 742 F.2d 142 (4th Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985), upheld an award of attorney's fees to the defendants where the plaintiffs sought injunctive and declaratory relief for alleged discrimination against county residents with respect to the taxing system. Referring to the intervening decision in *Grace Brethren Church*, 457 U.S. at 417, the court stated: "[i]n light of the settled principle of law existing before the filing of this action and handed down during the action, all before the hearing in the district court [but after the plaintiffs amended their complaint in response to the decision in *Grace Brethren Church*], we conclude that plaintiffs' suit is meritless within the meaning of *Christiansburg Garment Co.*, in that it is unreasonable or groundless and that the plaintiffs continued to litigate after it clearly became so." *Hutcherson*, 742 F.2d at 146 (citation omitted).

not on the adequacy of the state procedures to allow a tax objector to raise the issue, framed as a due process right, in state court. However, it would appear that the question at least arguably implicates certain procedural protections. This is true if the issue is stated in the terms highlighted by *Rosewell*, that is, whether the lack of discovery is a procedural defect in the Illinois remedy which "would preclude presentation and consideration of [plaintiffs'] federal rights." *Rosewell*, 450 U.S. at 514-15. Here, presumably, it is the alleged constraint on the development of the factual basis for a possible federal claim which may preclude consideration of the federal right. In addition, it is an issue which was not addressed in either *Hamer v. Anderson* or *Rosewell*. Thus, we cannot agree that this allegation was frivolous or unreasonable.

Next, the plaintiffs claim that the procedures are not "speedy" as evidenced by a seventeen year delay the Hamers experienced before obtaining a tax refund from an objection filed in 1961. *Coleman*, 631 F. Supp. at 758 n.20. However, it is quite clear that the "speediness" issue was directly addressed and rejected in both *Hamer*, 594 F. Supp. at 563, and *Rosewell*, 450 U.S. at 520-21. Thus the claim is frivolous.

Last, the plaintiffs assert that the Illinois procedures are not "efficient" for two reasons. First, the plaintiffs state that the Board presumes that the Township Assessor's valuation is correct and therefore that the assessor does not consider a taxpayer's evidence of disparities or other evidence unless it supports the county's assessment. The district court found that this assertion was simply not supported by the evidence. *Coleman*, 631 F. Supp. at 760. The procedures published by the Lake County Board ("Board of Review Suggestions to Assist the Taxpayer") provide that a taxpayer may introduce evidence comparing the assessment of one's property with a lower assessment of similar property. In addition, the district court notes that the plaintiffs' claim is contradicted by their own evidence submitted in a class member's case in which the Board stated that it would consider evidence of compar-

able property assessments. The district court found that the Board considered the disputed evidence but simply found it was not persuasive. Given the clear lack of evidence indicating that it was the general policy of the county to ignore the disputed data, the district court did not abuse its discretion in finding the claim to be frivolous.

However, a more difficult question is presented by the second objection to the efficiency of the procedures. The plaintiffs argue that the Board's failure to articulate a "set standard" of proof for judging complaints renders the hearing "meaningless" and thus inefficient according to the definition stated in *Rosewell*, 450 U.S. at 518 (remedy which "imposes no unusual hardship on respondent requiring ineffectual activity or an unnecessary expenditure of time or energy" is efficient). The issue is more troubling because the evidence indicates that the Board does not, in fact, apply a "set standard" of proof. The district court correctly held that the failure to articulate a standard does not render the proceeding "meaningless" provided the Board fairly considers all the evidence submitted. *Coleman*, 631 F. Supp. at 760. However, that is not to say that the plaintiffs' argument was frivolous as a result. Again, it would appear that the question arguably implicates the sort of procedural protections which might preclude consideration of other federal rights. One can at least reasonably assert that an issue concerning the standard of proof presents a question of procedural significance affecting the ability to adequately develop a federal claim under the state system of review. Of course, there are serious problems with this argument, not the least of which is the existence of administrative review on appeal to the PTAB, or, alternatively, of *de novo* review in the circuit court if a taxpayer decides to file a tax objection in response to the county's application for judgment. Nonetheless, it is not appropriate to characterize the argument as unreasonable.

The fact that we find two of the plaintiffs' claims not to be frivolous does not, however, end the inquiry. In *Hill v. Norfolk and Western Railway Co.*, No. 86-2202,

slip op. at 12-13 (7th Cir. March 16, 1987), a decision discussing the issue of attorney's fees awarded as a sanction imposed under Fed. R. App. P. 38, this court held that it is appropriate under certain circumstances to award fees despite the presence of at least one reasonable claim. The court stated: "[i]t would be strange if by the happenstance of including one colorable (though losing) claim amidst an ocean of frivolous ones, a litigant could ward off sanctions." *Hill*, slip op. at 12-13; *see also District No. 8*, 807 F.2d at 623. This approach is as applicable with respect to an award of attorney's fees under Section 1988 as it is in Rule 38 sanction cases. However, as a general rule, it is important to stress that reviewing courts are hesitant to impose a requirement on the lower courts and litigants which would lead to the need to distinguish between frivolous and nonfrivolous claims in every case. *See Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1168 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); *Quiros v. Hernandez Colon*, 800 F.2d 1, 2 (1st Cir. 1986).[13] Therefore, we must decide whether the case before us falls within the exception for claims which are colorable but are raised "amidst an ocean of frivolous ones" or whether the general rule against such an approach should apply.

Here, as in *Hill*, there is little doubt that the plaintiffs' suit lacks the necessary force to stave off an award of

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[13] In *Miller Brewing*, 739 F.2d at 1168, this court declined to award attorney's fees under its "inherent power" and stated:

> The company's resistance to the arbitrator's finding that it violated the preference clause may have been frivolous; but we doubt whether it would be worthwhile, at least as a general rule, to divide a suitor's claims (or defenses) into frivolous and nonfrivolous, and award attorney's fees in respect to frivolous claims but not the others. The added burden to the court of making this determination would often outweigh the benefit to the party of obtaining a partial award of attorney's fees. Although it is costly to defend against a frivolous suit, the marginal costs of knocking out the frivolous claims in a suit that has a meritorious core usually are not great.

attorney's fees. The plaintiffs' complaint clearly focused on the substantive concern that assessment disparities tend to disproportionately impact certain taxpayers in certain districts. On appeal, the plaintiffs made a valiant effort but were only able to identify two procedural issues of any possible merit. However, these issues were essentially lost among thirty-four pages of allegations raised in their complaint challenging the substantive right to correction of the disparities.[14] And only the discovery issue specifically related to the question of assessment disparities. Moreover, the plaintiffs were cautioned by both the district court and their opponents with respect to the validity of their claims, and we urge and applaud such efforts to monitor the course of litigation. *See Coates*, 811 F.2d at 1053 ["careful judicial oversight during discovery will encourage 'the abandonment of claims that become hopeless' without discouraging 'the nonfrivolous filing of civil rights suits' " (quoting *Hermes*, 742 F.2d at 358)]. Therefore, because of the largely disproportionate time and expense the defendants have had to devote to defending against the frivolous aspects of the plaintiffs' claims, it is clear that an award of attorney's fees is appropriate.

In addition to imposing attorney's fees and expenses against the plaintiffs, the district court also imposed fees against their attorneys pursuant to Section 1988. However, Section 1988 only authorizes the imposition of fees against parties to the litigation, not their attorneys. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 761 (1980); *Oliveri v. Thompson*, 803 F.2d 1265, 1272 (1st Cir. 1986).

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[14] Of course, we realize that it only takes one claim of merit in order for a suit to prove to be successful. And surely we do not mean to imply that civil rights plaintiffs should be penalized for pursuing a multi-pronged attack on a given issue. However, when it is evident that selected claims have proven to be meritless over the course of the litigation, it is unreasonable for plaintiffs to expect the defendants to shoulder the costs of litigating the claims. Here, it is quite clear that the plaintiffs focused almost entirely on the substantive federal claims throughout the litigation. In fact, the same is largely true of the plaintiffs' arguments on appeal.

cert. denied, 107 S. Ct. 1373 (1987). Therefore, although we find that the district court was justified in imposing attorney's fees against the plaintiffs, we vacate as much of the decision as imposes fees against the plaintiffs' attorneys. Without expressing any opinion with respect to the liability of the plaintiffs' attorneys, we remand to allow the district court to consider alternative theories of liability.[15] And, because the district court clearly contemplated imposing attorney's fees according to a "package plan" (by referring to joint and several liability), we also remand to allow the court to restructure its order in light of this decision.

III

For the foregoing reasons, we affirm that portion of the district court's decision which imposes attorney's fees and expenses against the plaintiffs under Section 1988 and we

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[15] We note that a court may impose attorney's fees under its "inherent power," provided the attorney "acted in bad faith, vexatiously, wantonly, or for oppressive reasons," *F.D. Rich Co. v. United States*, 417 U.S. 116, 129 (1974); *Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc.*, 809 F.2d 451, 455-56 (7th Cir. 1987), or under Fed. R. Civ. P. 11 when an attorney's arguments are objectively unreasonable at the time they are advanced. *Id.* at 453. However, as opposed to the "bad faith" exception, Rule 11 does not impose a continuing obligation on attorneys to reevaluate the merits of the case as the litigation develops. *Id.* at 455; *Oliveri*, 803 F.2d at 1274; *contra Thomas v. Capital Security Services*, 812 F.2d 984 (5th Cir. 1987); *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1127 (5th Cir. 1987). Therefore, liability under Rule 11 is improper here based on the allegations contained in the plaintiffs' amended complaint because the arguments were not objectively unreasonable until after *Hamer v. Anderson* had been decided. Of course, liability for attorney's fees can be based on pleadings advocating an unreasonable position after the *Hamer v. Anderson* decision. And attorney's fees can be recovered under 28 U.S.C. § 1927 provided an attorney "multiplies the proceedings in any case unreasonably and vexatiously." *Westinghouse Electric Corp. v. NLRB*, 809 F.2d 419, 425 (7th Cir. 1987); *In re TCI Ltd.*, 769 F.2d 441, 445-47 (7th Cir. 1985).

vacate and remand for further consideration with respect to counsels' possible liability and for any resulting adjustment required in the district court's overall plan for imposing fees and expenses. In considering the amount of fees to be imposed some reasonable consideration should be given to the fact that not all the plaintiff's claims were frivolous, although no "fine tuning" need be attempted. *Quiros*, 800 F.2d at 2.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

A true Copy:

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PAUL HAMER, et al.,	)	DOCKET NO. 78 C 2117
Plaintiffs,	)	
vs.	)	
COUNTY OF LAKE, et al.,	)	Chicago, Illinois
	)	January 28, 1988
Defendants.	)	9:45 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MILTON I. SHADUR, Judge

APPEARANCES:

For the Plaintiffs:
MR. JACK L. URETSKY and
MR. MARSHALL PATNER

For the Defendants:
MR. JAMES BAKK

JESSE ANDREWS
Official Court Reporter - U.S. District Court
219 S. Dearborn Street
Chicago, Illinois 60604
(312) 922-5955

* * * * * *

THE CLERK: Case No. 78 C 2117, Paul Hamer vs. County of Lake, status.

MR. URETSKY: Good morning, your Honor. Jack Uretsky for Paul Hamer and himself.

MR. PATNER: Marshall Patner, another attorney for the plaintiff.

MR. BAKK: James Bakk for the defendants.

THE COURT: Good morning. Counsel, I am going to have to beg your indulgence, if I can, for about 10 minutes, because I am sort of going pillar to post this morning. I have limited time constraints, and I've got an opinion that is in the works that I've got to get out that's on a second run, if I hear the noise correctly, on the word processor. So if you will bear with me, I'll be back out -- I would judge ten minutes, certainly no more than 15. Okay?

MR. BAKK: Yes. Thank you, your Honor.

(Short Recess).

THE COURT: Counsel, I appreciate your indulgence. As you know, I have now received all of the mass of materials on this, I trust, final stage of this by now decade-old lawsuit -- the last thing being the Lake County reply memorandum of January 11th. Let me treat with several issues that are posed here.

And first I would like to dispel what I perceive as an obvious misunderstanding that is reflected in the Court of

Appeals' opinion, 819 F.2d at page 1317. There the Court refers to what they characterize as a "package plan," and that strikes me as a clear misapprehension of what I would have thought to be the clear implication of an order for joint and several liability. Just as in the case of joint tortfeasors, joint and several liability is imposed for the benefit of those who are injured, not for the benefit of those who cause the injury (except in the case of severable and discrete harms). The fact that one alleged joint tortfeasor might be held nonliable doesn't reduce at all the amount of the judgment against the other or others among the tortfeasors. Each joint tortfeasor is liable, of course, for the full amount, with the plaintiff entitled to only a single satisfication.

Accordingly, there is no predicate for reduction of the amount (which is what is suggested at least in Mr. Uretsky's long memorandum, and I think, Mr. Patner, your suggestion too). If the attorneys were not to be held responsible, that wouldn't impact at all on the liability of the plaintiffs.

Now as for the award against the lawyers, there is, in this situation, ample basis for sustaining that award on alternative grounds despite the unavailability of Section 1988. As all of us know, Rule 11 applies to objectively unreasonable arguments that have been advanced by counsel (and certainly I don't have to be repeating any of the jurisprudence on Rule

11). 28 United States Code Section 1927 has been construed by our Court of Appeals in that TCI Limited case to impose exactly the same objective rather than subjective bad-faith standard to the unreasonable and vexatious multiplication of proceedings (which is what the status talks about) -- although it is true, I think, that earlier Seventh Circuit opinions had not only suggested otherwise, but in my view had held otherwise. I remember one review of a case of Judge Aspen in which it was very plain that they were applying a subjective bad-faith standard. And I think that Judge Easterbrook sort of subliminally overruled that earlier material, although his discussion purported to be totally consistent with that.

That however is really a side-issue. Because I think that for the reasons that I will explain in a minute, Rule 11 is certainly enough -- and again, I believe 1927 too. That makes it unnecessary to deal with the inherent power argument -- because at least my reading of the "inherent power" situation has always been that it treats with the bad-faith concept as one of the limited exceptions to the American rule.

Now plaintiffs' memoranda raise, on a continuing basis, a red herring in pointing to the Seventh Circuit's having identified Hamer against Anderson as the watershed, as between measuring whether the plaintiffs' activity was objectively unreasonable or not. As my opinion made very plain, it was only the post-Hamer-against-Anderson period for

which the defendants sought fees, and for which I awarded fees. And the Court of Appeals opinion reflects that (that's 819 F.2d at 1365). So the posture of the case before Hamer against Anderson is really irrelevant. And moreover and relatedly (and this bears on the Rule 11 concept), nothing in the award that I made was based either on the allegations of the Complaint or on the failure to reevaulate the case as such. Instead the entire award was based only on the post-Hamer-against-Anderson activities by counsel in the form of written materials, and what they triggered in terms of the work unduly imposed on defense counsel as a result. So that the standards that were correctly noted in the Court of Appeals opinion at page 1370 Note 15 (that very long footnote) have been amply met, and I think were plainly covered by the manner in which the entire thing was structured.

Now, Mr. Uretsky, your arguments for wholesale disallowance of time are really without merit here. What our Court of Appeals was able to identify as arguably nonfrivolous represented two needles in this haystack. One of those didn't apply to the Lake County defendants (although, you know, they were forced basically to respond to it). As for the other one, I would only point out parenthetically that the Court of Appeals (although it said it was not appropriate to characterize the argument as unreasonable) said that it found "serious problems" with the argument. That's at page 1369 (a

statement that, I, having lived through them, think is a bit euphemistic -- but that's neither here nor there).

In any event, what I have done is to give plaintiffs and counsel the benefit of every reasonable doubt with respect to these limited items -- or really more accurately, one limited item -- out of the entire presentation that has passed even the moderate or liberal standard that's appropriately to be applied. And I find that no more than a very minor reduction in the award is called for.

Everyone agrees, I think, that to engage in what the Court of Appeals referred to as "fine tuning" would serve no useful purpose, because what it would do is to really multiply the proceedings further (and vexatiously so) -- and that then creates the potential for fees-on-fees that I think ought to be avoided entirely, because it's nonconstructive from anybody's point of view.

What I find, then, are these things: First, that counsel are indeed jointly and severally liable under either or both of Rule 11 and Section 1927, for the objectively unreasonable post-Hamer-against-Anderson activity, triggered by the plaintiffs' continued assertion of the untenable positions, and excluding those that the Court of Appeals found survive that test of frivolousness or objective unreasonableness.

Second, I find that based on that, at most a five percent reduction in the awarded amount is appropriate.

Third, I find that interest is awardable at post-judgment rates since the time of the original decision. That reflects really nothing more than the loss of the use of money. The alternative would be to raise what was basically a sort of bargain-basement $85-an-hour rate to current rates -- which, as you know, courts consistently do in fee-award cases as a kind of surrogate for loss of the use of money. My own feeling is that because that kind of reference to current market rates is only an attempt to do rough justice in that regard, that it is better dealt with by giving effect to the real purpose for which that's awarded -- and that is, the fact that people don't get paid until sometime after the event has occurred.

Finally, I deny the motion made by Mr. Uretsky's last statement for Rule 11 sanctions with respect to striking the defendants' motion for attorney's fees. Dean Swift, I think it was, referred in one of his doggerel efforts at the concept that "All the fleas have fleas that bite 'em, and so on ad infinitum." And that's really what this effort is, which I think would in itself in all candor invite, Mr. Uretsky, a backlash of the potential for a Rule 11 award against your motion for a Rule 11 award -- which is the last thing that I want to get into in a case that's got a number 78 C 2117. So all I am doing at this point is denying the Rule 11 motion as totally without merit. And I trust that that's going to be the

end of that string.

Now I think that covers everything pending, right?

MR. BAKK: I believe it does, your Honor.

THE COURT: Well, the only other question is: When are you going to make payment -- or you or your clients?

MR. PATNER: On a stay of judgment pending possible appeal, I have not altered the security arrangements that I had made previously. And I believe Mr. --

MR. PATNER: Yes. Your Honor said that you thought this might be the end, but I really differ with your Honor about this matter. And although I'd like to study the transcript --

THE COURT: I mean the end here. I don't care what you do.

MR. PATNER: No, no. Of course you don't. But I just want to respond to your question, so that I would too, request a stay of judgment, and have the opportunity to examine your remarks and determine whether or not to appeal. Because I think that the reference back from the Court of Appeals made this appealable back to them, and now I think it is in a position to go to the Supreme Court. I have never understood what I think is a change of the law here -- that we were to be on notice of a District Court case where I thought the law was in a District Court case was one that may or may not be sustained until an appellate court had decided an issue.

THE COURT: Mr. Patner, my view is that using Haner against Anderson as a measure was, if anything, charitable to you people, because the plain impact of the Supreme Court's decisions had been that. But I don't want to pause on that one now, you know. Basically what happened is -- my perception of what happened here is that at every level you people were basically cut back on your potential exposure by the use of Haner against Anderson as the starting point, rather than perhaps an earlier one. Because basically at that point, or following it, you people were put on notice -- wait a minute. Why are you still doing this? Because as you know, I cut back the amount of time substantially. In my review of it I cut back the hourly rate. So that at this point my perception is that you are looking not one but several gift horses in the mouth. If you want to pursue it, you know, that's of course your privilege -- as it is of every litigant. All I have dealt with are the issues that are before me now on this limited remand, and I have done that.

Now on this question of stay, I don't know what the situation is with respect to bond. I suspect that at this point if you have something posted, it probably doesn't meet the standards because the amount has now shifted. Remember that if you posted it back then, it probably was 111% wasn't it, plus 250 --

MR. PATNER: There was no bond, your Honor.

THE COURT: No bond?

MR. URETSKY: I deposited money in an escrow account which is interest bearing.

THE COURT: Well, all I am saying --

MR. URETSKY: That escrow account still exists.

THE COURT: All I will say on that one is this: If appropriate security is posted, I will of course stay it. But the appropriate security has to be something that is now measured in terms of what the current award represents -- that is, the reduced amount plus the interest factor, and taking into account (as our own rule applies) the potential time interval that is anticipated for the pendency of the appeal, plus whatever the costs are. So as long as you satisfy that kind of number, however you do it, it's perfectly satisfactory with me to grant the stay. I can't do it at this minute, because I don't have the information from you as to whether what you have done suffices.

MR. URETSKY: May I suggest this, your Honor? We have worked it out with counsel -- we submitted the idea to counsel on this deposit -- and if we make a representation that either of us -- perhaps it is my turn -- but would add to that account to cover the difference whatever it is that you just mentioned -- and if counsel doesn't object to that, would that be adequate? I mean I don't think either us are going any place.

THE COURT: I know that. And it is really --

MR. URETSKY: Yes, it is a formality, but we have to meet it.

THE COURT: That's right.

MR. URETSKY: But I think we did work it out between us before. And we sent you a letter which counsel was satisfied with.

THE COURT: Yes. The only thing I wanted to call your attention to -- the thing you want to take care of -- if you want to do by discussion between yourselves --

MR. URETSKY: Yes.

THE COURT: -- is that I have now built in what amounts to a post-judgment provision.

MR. URETSKY: Yes.

THE COURT: And I don't know whether escrowed accounts in these days of interest rates -- you know, you never know what the arbitrage is. So as long as you take care of that so they are amply protected, that's fine.

MR. URETSKY: We add a factor --

THE COURT: Yes, right.

MR. URETSKY: How should we proceed then, since you will be gone?

THE COURT: Well, Mr. Bakk, what's your view on that?

MR. BAKK: Well, frankly, if Mr. Patner and Mr.

Uretsky will adjust their pledge accounts as it were, I don't see any problem in agreeing to that, so that Mr. Patner could bring it into whatever judge is taking your place in the interim, so that I won't have to come down here --

THE COURT: All right.

MR. RAKK: -- if it is stipulated.

THE COURT: That's fine. All you have to do is, whenever you've got the thing set up, go before whichever of my colleagues is handling my motion call at that point. Simply tell him, as I've just indicated here, that I am perfectly happy to continue the stay, assuming that you work the numbers out so that they cover the amount of the award.

MR. URETSKY: We appreciate counsel's cooperation. Thank you very much.

THE COURT: Thank you.

MR. PATNER: Is your opinion available now, your Honor?

THE COURT: Which opinion?

MR. PATNER: Is there a written opinion, or will there be something --

THE COURT: You just got it.

MR. URETSKY: You just got it. It's got to be written.

MR. PATNER: Okay. Perhaps we can get it then.

THE COURT: Talk to my court reporter.

MR. PATNER: We will do that, Judge.

THE COURT: Thank you.

MR. PATNER: Have a good trip, Judge.

THE COURT: Thank you.

(WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE-ENTITLED CAUSE ON THE DAY AND DATE HEREOF.)

C E R T I F I C A T E

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the report of proceedings in the above-entitled cause.

JESSE ANDREWS, CSR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DATED: March 2, 1988

APPENDIX F

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 88-1332 and 88-1354

PAUL HAMER and JUNE HAMER,

Plaintiffs-Appellants,

v.

COUNTY OF LAKE, LAKE COUNTY BOARD OF REVIEW, and its individual members, and ROBERT G. JASPER,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 78-C-2117—Milton I. Shadur, *Judge.*

ARGUED SEPTEMBER 23, 1988—DECIDED MARCH 13, 1989

Before WOOD, JR., EASTERBROOK, *Circuit Judges*, and GORDON, *Senior District Judge.**

GORDON, *Senior District Judge.* This appeal presents an unfortunate example of legal representation that crosses the line between persistent advocacy and misuse of the judicial process. In a misguided effort to obtain reconsideration of substantive arguments that have twice been determined to lack merit, the appellants ask this court to set aside an established doctrine known as "the

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* Honorable Myron L. Gordon, Senior District Judge of the Eastern District of Wisconsin, is sitting by designation.

law of the case." The Hamers are now making a frivolous argument in order to justify a *de novo* review of matters already found frivolous. For reasons stated herein, the decision of the district court to impose sanctions against the plaintiffs' attorneys will be affirmed and the case remanded to the district court for an award of additional fees incurred by the appellees in defending this appeal.

Ten years ago, the plaintiffs brought this suit challenging the adequacy of the Illinois property tax assessment procedures. The district court held that the suit was barred by the Tax Injunction Act as construed in *California v. Grace Brethren Church*, 457 U.S. 393 (1982); *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981); and *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100, 116 n.8 (1981). These decisions established that in cases challenging state tax assessment procedures, the scope of review by the federal district courts is limited to an examination of the procedural adequacy of the state remedies; the district courts are precluded from review of substantive claims if the state procedures meet proper standards.

The district court held that the bulk of the plaintiffs' claims alleged violations of substantive rights and therefore dismissed the action for lack of subject matter jurisdiction. The plaintiffs then appealed, and the decision of the district court was affirmed by this court. *Coleman v. McLaren*, 631 F.Supp. 749 (N.D. Ill. 1985), *aff'd*, 796 F.2d 477 (7th Cir. 1986) (unpublished order).

The prevailing defendants then petitioned the district court for an award of attorneys' fees and expenses pursuant to 42 U.S.C. § 1988. The district court held that pursuit of the claims in the face of the intervening developments in the law was objectively unreasonable and therefore awarded fees and costs against both the plaintiffs and their attorneys. *Coleman v. McLaren*, 631 F.Supp. 763 (N.D. Ill. 1986). The district court thus found the plaintiffs' claims to be devoid of legal merit. The district court criticized the plaintiffs' attorneys for "flat-out misreading or

misapplications of controlling authority." *Id.* at 767. The attorneys were characterized as suffering from an "empty head, pure heart syndrome." *Id.* at 766.

The three decisions in *Grace Brethren Church*, *Rosewell*, and *McNary* have made clear that the subject matter jurisdiction of the district courts in this type of case is limited to a review of whether state tax assessment procedures are "plain, speedy and efficient." During the course of this litigation the applicability of *Grace Brethren Church*, *Rosewell*, and *McNary* to the issues at bar was made especially clear by a decision in another (but not wholly unrelated) case; in *Hamer v. Anderson*, 594 F. Supp. 561 (N.D. Ill. 1984), a case brought by the same plaintiffs, Judge Marvin Aspen determined that the Illinois tax assessment procedures, as applied in the very same counties that are the subject of the instant action, were "plain, speedy and efficient."

In the matter now at bar, Judge Shadur concluded that the *Hamer v. Anderson* ruling provided a fixed point in time to have allowed sufficient notice of the clear applicability of Supreme Court precedents to the issues at bar. On appeal, this court held, in 1987, that the bulk of the plaintiffs' claims were frivolous and therefore affirmed Judge Shadur's imposition of attorneys' fees against the plaintiffs. However, we vacated the award as it applied to the plaintiffs' attorneys because § 1988 authorizes the imposition of attorney's fees only against parties to the litigation. The case was remanded to the district court for consideration of alternative theories of liability. *Hamer v. Lake County*, 819 F.2d 1362 (7th Cir. 1987). On remand Judge Shadur reimposed liability for attorneys' fees on the plaintiffs' attorneys under Rule 11, Federal Rules of Civil Procedure, and/or 28 U.S.C. § 1927. Predictably, the plaintiffs have appealed.

Thus, for the third time, the case is before this court. The plaintiffs' attorneys ask that this court engage in a *de novo* review of whether the underlying claims are frivolous; two fallacious arguments are advanced to justify their misguided request.

First, it is argued that a *de novo* standard of review is applicable to a district court's legal conclusion that conduct in a particular case constitutes a violation of Rule 11. Second, the appellants ask that the doctrine of the law of the case be set aside so as to enable consideration of the substantive claims without regard to this court's prior two rulings in this case.

This action is controlled by the doctrine of the law of the case. Judge Shadur's decision that the underlying conduct was frivolous has already been affirmed by this court. *Hamer, supra*, 819 F.2d at 1370. Therefore, this court need not address the appellants' first argument.

As to the second argument, the appellants misconstrue the prior holding of this court as standing for the proposition that the decision by Judge Aspen in *Hamer v. Anderson*, a district court decision, was binding precedent on the appellants in their case before Judge Shadur. They reason that since district judges are not bound by decisions of other district judges, this court's holding was erroneous.

It is established that "matters decided on appeal become the law of the case to be followed . . . on second appeal, in the appellate court . . .". *Devines v. Maier*, 728 F.2d 876, 880 (7th Cir. 1984) (quoting *Kaku Nagano v. Brownwell*, 212 F.2d 262, 263 (7th Cir. 1954)). The doctrine of the law of the case is:

> "based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that 'there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members;' and that it would be impossible for an appellate court 'to perform its duties satisfactorily and efficiently' and expeditiously 'if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal' thereof."

Devines, 728 F.2d at 880 (quoting *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967)).

The doctrine is subject to three limited exceptions: "[i]f the evidence in a subsequent trial is substantially different, if controlling authority has since made a contrary ruling of law, or if 'the decision was clearly erroneous and would work a manifest injustice' then the law of the case need not be followed." *Anderegg v. High Standard, Inc.*, 825 F.2d 77, 80 (5th Cir. 1987) (quoting *Adams-Lundy v. Assoc. of Professional Flight Attendants*, 792 F.2d 1368, 1371-72 (5th Cir. 1986)).

The appellants' argument fails because Judge Shadur appropriately held that as of the date of the *Hamer v. Anderson* decision, the applicability of key Supreme Court precedent (*Grace Brethren Church*, *Rosewell*, and *McNary*) to the instant case was made unquestionably clear; this court affirmed that judgment, and at that point it became the law of this case. The error alleged by the appellants does not exist, and there is no basis for our disregarding the doctrine of the law of the case.

The judgment of the district court is affirmed, and the case is remanded in order that the district court may make an additional award of attorneys' fees to the appellees under Rule 11 for legal services required in successfully defending this appeal. In *Hays v. Sony Corp. of America*, 847 F.2d 412, 419 (7th Cir. 1988), this court stated:

> Rule 11 is a free-shifting statute, and a uniform body of law has grown up about such statutes entitling a party who successfully invokes the statute to obtain reasonable fees incurred in obtaining the statutory fees, plus reasonable fees in defending the award on appeal. [citations omitted] There is no reason to complicate this body of law by making an exception for Rule 11 fee-shifting.

The appellees were subjected to objectively unreasonable claims by the plaintiffs. As a result the case was properly dismissed and fees were awarded against the plaintiffs pursuant to § 1988 and against the plaintiffs' attorneys pursuant to Rule 11 and § 1927. The appellees have suc-

cessfully defended the award of fees at issue on this appeal, and they are entitled to an additional award of attorneys' fees incurred on this appeal. Affirmed and remanded.

A true Copy·
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TMF TOOL CO., an Illinois corporation,	)	
Plaintiff,	)	No. 87 C 8620
v.	)	Judge Suzanne B. Conlon
E. M. FINANCIERE & HOLDING, S.A., a Swiss corporation, and HANS MULLER,	)	
Defendants.	)	

DOCKETED
AUG 18 1988

MEMORANDUM OPINION AND ORDER

On June 14, 1988, this court entered an order granting the motion of E. M. Financiere & Holding, S.A. ("E. M. Financiere") and Hans Muller ("Muller") to dismiss the three-count complaint[1/] of TMF Tool Co. ("TMF"). Memorandum Opinion and Order, dated June 14, 1988 ("Order"). TMF was granted leave to file an amended complaint to replead Counts I and II. Id. at 11-12. TMF never filed an amended complaint; rather, it elected to dismiss the action pursuant to Fed.R.Civ.P. 41(a)(1). On June 27, 1988, defendants filed a motion for sanctions pursuant to Fed.R.Civ.P. 11. For reasons set forth below, the motion is granted with respect to defendant Muller.

1/ Count I sought injunctive relief. Count II purported to allege fraud and sought reformation of a note executed by TMF. Count III sought declaratory relief and an accounting.

Rule 11 of the Federal Rules of Civil Procedure ("Rule 11") provides that if an attorney signs pleadings that are not reasonably based on the law or in fact, or are meant to harass, the court shall impose an appropriate sanction, including expenses incurred by the other party because of the filing of the pleading. Fed.R.Civ.P. 11. The standard for imposing sanctions under Rule 11 requires an objective determination of whether a sanctioned party's conduct was reasonable under the circumstances. Brown v. Federation of State Medical Boards of U.S., 830 F.2d 1429, 1435 (7th Cir. 1985). The court imposes Rule 11 sanctions on two grounds: (1) when a party fails to make reasonable inquiries into the facts and into the law, and (2) when a party files a motion, pleading or other document for purposes of delay, harassment, or increasing the costs of litigation. Id. When Rule 11 is violated, the district court must impose sanctions against the offending party. Dubisky v. Owens, No. 86 C 1920, slip op. at 4 (7th Cir. June 23, 1988). Compensation and deterrence are important considerations in imposing Rule 11 sanctions. Brown, supra, 830 F.2d at 1438. Where deterrence is the purpose behind the sanction, the court must strive to impose a sanction that fits the offending conduct. Id. at 1439.

Applying the criteria to this case, TMF violated the language and the purpose of Rule 11 with the prosecution of its claim against Muller. Had TMF inquired into the law of this circuit, it would have known that its attempted service upon

Muller, a non-resident, was improper. Specifically, TMF fraudulently enticed Muller into this jurisdiction to serve him with process at the conclusion of unsuccessful settlement discussions. Order at 4-7. The law clearly precludes service of process upon a non-resident defendant who enters the jurisdiction to discuss settlement unless plaintiff first communicates to defendant that pre-lawsuit negotiations are no longer feasible, or that plaintiff has chosen to pursue legal remedies. E/M Lubricants, Inc. v. Microfral, S.A.R.L., 91 F.R.D. 235, 238 (N.D. Ill. 1981).

Electing to pursue its claim against Muller notwithstanding invalid service of process, TMF proceeded at its own peril and expense. This court expressly found that TMF had failed to offer any evidence to controvert a finding of fraudulent enticement. Order at 7. Accordingly, TMF should bear the cost to Muller of researching and litigating his motion to dismiss for lac of personal jurisdiction. See Thorton v. Wahl, 787 F.2d 1151, 115 (7th Cir. 1986) cert. denied ___ U.S. ___, 107 S.Ct. 181 (1986 (counsel who puts burden of study and illumination on defendant or the court must expect to pay attorney's fees under Rule 11).

In addition to Muller's motion to dismiss the complaint for lack of personal jurisdiction, Muller and E. M. Financier jointly moved to dismiss the complaint pursuant to Fed.R.Civ.P. 9(b) and 12(b)(6). They argued that TMF failed to plead fraud with particularity and that it was not entitled to

injunctive relief. The court found that TMF did not sufficiently allege the elements of fraud. Order at 10. It dismissed Counts I and II but granted TMF leave to replead. Id. at 11-12. The court dismissed Count III for an accounting with prejudice on the ground that the allegations did not demonstrate the complexity necessary to warrant an accounting. Id. at 11.

Based upon the record, it is not clear that TMF's claims either were frivolous or asserted for purposes of delay or harassment. TMF was granted leave to replead Counts I and II. Moreover, TMF contends that defendants solicited a written offer of settlement, suggesting that defendants, themselves, attributed some substance to the claim. TMF's memo at 12. TMF's complaint reflects a reasonable inquiry into the facts and the law. It was not so unreasonable as to violate Rule 11. Defendants are not entitled to sanctions on this ground.

CONCLUSION

Sanctions are granted in favor of defendant Hans Muller. Muller shall submit within 10 days an affidavit reflecting attorneys fees, costs and expenses incurred in connection with the litigation of the portion of the motion to dismiss for lack of personal jurisdiction. The motion for sanctions is denied as to H. M. Financier.

ENTER:

Suzanne B. Conlon
Suzanne B. Conlon
United States District Judge

Dated: August 17, 1988